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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 David Bernard Clark,

10 Petitioner,

11 v.

12 Paul O'Connell, et al.,

13 Respondents.  
14

No. 4:13-CV-0129-TUC-JAS(JR)

**ORDER**

15 Pending before the Court is a Report and Recommendation issued by United  
16 States Magistrate Judge Jacqueline Rateau that recommends denying Petitioner's habeas  
17 petition filed pursuant to 28 U.S.C. §2254.<sup>1</sup> As Petitioner's objections do not undermine  
18 the analysis and proper conclusion reached by Magistrate Judge Rateau, Petitioner's  
19 objections are rejected and the Report and Recommendation is adopted.

20 The Court has reviewed the record and Magistrate Judge Rateau's  
21 recommendations de novo, and they are adopted.<sup>2</sup> See 28 U.S.C. § 636(b)(1); Fed. R.  
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23 <sup>1</sup> The Court reviews de novo the objected-to portions of the Report and  
24 Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for  
25 clear error the unobjected-to portions of the Report and Recommendation. *Johnson v.*  
26 *Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); see also *Conley v. Crabtree*,  
14 F. Supp. 2d 1203, 1204 (D. Or. 1998).

27 <sup>2</sup> A review of the record reflects that Petitioner may have been on parole rather than  
28 probation at the time of filing. This fact makes no difference to the correct legal analysis  
contained in the Report and Recommendation.

1 Civ. P. 72; *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *Conley v.*  
2 *Crabtree*, 14 F. Supp. 2d 1203, 1204 (D. Or. 1998).

3       Petitioner's most strenuous objection to the Report and Recommendation seems to  
4 be that it "should have included a reference to *Kennedy v. Mendoza-Martinez*, 372 U.S.  
5 144, 168-69 (1963)." (Doc. 23 at 3). However, the Report and Recommendation  
6 correctly relies on the controlling Supreme Court authority, *Smith v. Doe*, 538 U.S. 84  
7 (2003). And in any event, the Report and Recommendation implicitly addresses the key  
8 prongs of the *Mendoza-Martinez* test applicable to this case. See Report and  
9 Recommendation at 8-11. A *de novo* review of the record and pertinent authority reveals  
10 that explicitly citing *Mendoza-Martinez* would not materially change the analysis in the  
11 Report and Recommendation.

12       Before Petitioner can appeal this Court's judgment, a certificate of appealability  
13 must issue. See 28 U.S.C. §2253(c) and Fed. R. App. P. 22(b)(1). Federal Rule of  
14 Appellate Procedure 22(b) requires the district court that rendered a judgment denying  
15 the petition made pursuant to 28 U.S.C. §2254 to "either issue a certificate of  
16 appealability or state why a certificate should not issue." Additionally, 28 U.S.C.  
17 §2253(c)(2) provides that a certificate may issue "only if the applicant has made a  
18 substantial showing of the denial of a constitutional right." In the certificate, the court  
19 must indicate which specific issues satisfy this showing. See 28 U.S.C. §2253(c)(3). A  
20 substantial showing is made when the resolution of an issue of appeal is debatable among  
21 reasonable jurists, if courts could resolve the issues differently, or if the issue deserves  
22 further proceedings. See *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Upon review  
23 of the record in light of the standards for granting a certificate of appealability, the Court  
24 concludes that a certificate shall not issue as the resolution of the petition is not debatable  
25 among reasonable jurists and does not deserve further proceedings.

26       Accordingly, IT IS HEREBY ORDERED as follows:

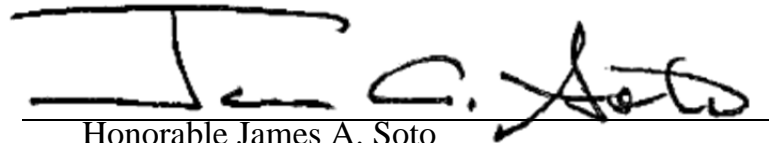
27       (1) The Report and Recommendation (Doc. 22) is accepted and adopted.  
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1 (2) Petitioner's §2254 habeas petition is denied and this case is dismissed with prejudice.

2 (3) A Certificate of Appealability is denied and shall not issue.

3 (4) The Clerk of the Court shall enter judgment and close the file in this case.

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5 Dated this 19th day of February, 2015.

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11 Honorable James A. Soto  
12 United States District Judge  
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